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OTHER INTERNATIONAL DEVELOPMENTS

ECE/INC-Forests4

Negotiations Resume

by Annalisa Savaresi*

The Fourth Session of the Intergovernmental Negotiating Committee for a Legally Binding Agreement on Forests in Europe (INC-Forests4) convened in Warsaw, Poland, 10–14 June 2013. INC-Forests4 was meant to be the last session to finalise “a holistic, legally binding framework forest agreement” (LBA), strengthening cooperation between the States of the European continent, to be considered, and possibly adopted and opened for signature, at an extraordinary FOREST EUROPE Ministerial Conference to be held by the end of 2013.¹

The delegates from 33 countries present in Warsaw, however, did not manage to reach an agreement on all outstanding issues for negotiation. After prolonged consultations, the session was suspended until a later date (place to be determined). This report reviews progress achieved at INC-Forests4, summarising the issues that remain outstanding.

Progress in Warsaw

When it opened, INC-Forests4 was expected to work pursuant to an ambitious negotiation agenda, including the finalisation of the text of the LBA and arrangements for its presentation to the extraordinary FOREST EUROPE Ministerial Conference. Negotiations largely centred around the finalisation of the LBA draft negotiating text, which had come to Warsaw in a relatively advanced stage of drafting.

At the conclusion of the resumed session of INC-Forests3 (St Petersburg, April 2013), delegates had agreed to substantially restructure the text, following a proposal by the Swiss Federation. Some portions of text had been agreed *ad referendum*, including the preamble, as well as some substantive provisions (for example, those addressing the productive functions of forests). Most sections of the negotiating text, however, remained in a bracketed form, including several that have fundamental implications for the scope of the agreement – such as the definition of forest, and forests’ contribution to global carbon cycles – as well as crucial operational arrangements, including naming the institution(s) that will act as depositary and/or provide secretariat services.

In Warsaw, delegates made substantive progress on most elements of the negotiating text, working in plenary, and in informal contact groups, aided by a legal expert

group established in St Petersburg. By the time it was decided to recess INC-Forests4 pending later resumption, the draft negotiating text included a preamble, 27 articles, and two annexes (on arbitration and conciliation, respectively).

The preamble of the draft negotiating text was entirely agreed *ad referendum*, including references to the Rio Declaration on Environment and Development² and the main international instruments directly and indirectly dealing with forests. It therefore recognises the importance of international cooperation and sustainable forest management (SFM) in implementing the decisions taken under the Convention on Biological Diversity (CBD) (including the Aichi Biodiversity Targets), the United Nations Framework Convention on Climate Change (UNFCCC), the United Nations Convention to Combat Desertification and the Ramsar Convention on Wetlands.³ These references may be regarded as an expression of the intention not to significantly depart from the body of international instruments dealing with forests, particularly those recognised within the framework of FOREST EUROPE.⁴ The preamble also mentions the United Nations Declaration on the Rights of Indigenous Peoples, acknowledging its relevance.⁵ This recognition may be regarded as particularly significant in light of the vast body of international and regional human rights law on the rights of indigenous peoples and other forest-dependent communities in relation to forests and their resources.

Prior to recessing, INC-Forests4 was able to adopt most substantive articles of the drafting negotiating text *ad referendum*, and to get past the controversies concerning terms and definitions. The definition of forest that was agreed in Warsaw builds upon the UN Food and Agriculture Organization’s (FAO’s) definition, but leaves States free to apply their national definitions, so long as the Secretariat is duly informed of this choice and of the definition to be applied.⁶ This compromise solution potentially leaves the door open for considerable difference in interpretation among the Parties, regarding the object of the LBA. The section on definitions also includes a definition of “illegal harvesting”,⁷ reflecting an apparently definitive departure from the use of the term “illegal logging”, which appeared in earlier editions of the draft negotiating text.

In outlining the principles that parties must respect when implementing the LBA, the draft acknowledges that each party is responsible for SFM on its territory and for the development and implementation of policies that are “adequate to its respective national conditions and needs”.⁸

* Research Fellow at the University of Edinburgh, and a regular contributor to EPL.

The principles also provide that the Convention is intended to reinforce and strengthen the implementation of SFM “in a way that is mutually supportive with existing rights and obligations under other multilateral agreements relevant to this Convention”.⁹ This clause, which appears in several MEAs, constitutes a further expression of the negotiators’ intention to align the LBA with extant instruments.

As stated in the draft, the LBA’s objectives are wide-ranging in scope, including strengthening SFM; enhancing the contribution of forests and forestry to the solution of global challenges; and maintaining, protecting, restoring and enhancing forests’ health, productivity, biodiversity, vitality and resilience, and capacity to adapt to climate change and combat desertification.¹⁰ The text further mentions the need to ensure that forests contribute effectively to sustainable development.¹¹



In a late-night session

Courtesy: IISD-Earth Negotiations Bulletin

Although ambitious, these objectives are not coupled with an equally ambitious set of obligations. In fact, the substantive provisions of the LBA are broadly worded in a manner typical of framework conventions, setting out a series of objectives and principles, but leaving the definition of more concrete obligations to subsequent instruments. In further indication of this approach, the draft negotiating text specifically contemplates the adoption of protocols.¹²

Regarding SFM, the draft mandates that parties take measures to ensure that SFM be implemented in a manner that takes into account the implementing country’s specific forest conditions and national priorities.¹³ It identifies a set of rather general criteria for SFM, and requires parties to develop, implement and update national forest programmes or equivalents, making explicit reference to Vienna Resolution 1.¹⁴ Parties to the LBA are also required to strengthen and enhance international cooperation and coordination to foster coherence and avoid duplication of or overlap with the work of relevant international agreements.¹⁵

The substantive obligations of parties are encapsulated in a series of provisions agreed *ad referendum* concerning forests’ contribution to global carbon cycles; forest health and vitality; forest biodiversity; and forests’ productive, protective and socio-economic functions.¹⁶ These

provisions are hardly ground-breaking, instead reiterating commitments found in other international and FOREST EUROPE instruments.

INC-Forests4 rejected an important suggestion by Iceland that the text should include a mention of deforestation in its provision concerning forests’ contribution to global carbon cycles.¹⁷ Although deforestation is not seen as significantly affecting the continent of Europe, a provision addressing it in the context of the LBA could have had important international trade implications, and led to innovative developments, if the LBA were ever opened for accession by non-European States.

The remainder of the negotiating text deals with operational matters, establishing the Conference of the Parties (CoP), Secretariat, and Compliance Committee; and providing mechanisms for the settlement of disputes. INC-Forests4 delegates could not reach an agreement prior to recessing the session on how to finalise the text concerning these issues and the related text remains partially bracketed. Delegates also started drafting a document by which the final draft agreement would be presented to ministers at the Extraordinary FOREST EUROPE Ministerial Conference.¹⁸ The text however remains at an early stage of drafting, pending decisions on fundamental operational arrangements – the selection of institution(s) that will be acting as depositary and/or providing secretariat services.

Outstanding Issues

Agreement on the institution(s) that will serve as the depositary and/or host for the Convention and that will provide secretariat services proved to be the most controversial issue on the negotiating table in Warsaw. Pursuant to the Oslo Mandate, the United Nations Economic Commission for Europe (UNECE), FAO, the United Nations Environment Programme (UNEP) and the European Forest Institute (EFI) have jointly serviced the INC-Forests process.¹⁹ Their mandate, however, does not provide any indication as to which institution ought to provide secretariat services and serve as depositary once the LBA has been adopted.

This matter had already been debated at length in earlier INC-Forests sessions, where delegates agreed to bring the LBA under the UN umbrella.²⁰ This preliminary decision however did not go so far as to definitively identify the institution(s) that would directly service the LBA.

In Warsaw, Chair Jan Heino explained that for the LBA to be adopted under the UN umbrella, either the FAO Director-General or the UN Secretary-General would have to act as depositary.²¹ With regard to the institutions performing secretariat functions, the main options were either the FAO or UNECE or both, possibly with the support of UNEP.²² During the Warsaw session, delegates heard representatives from the UNECE and FAO exchanging views and making their cases for selecting their respective agencies as host for the LBA Secretariat. In this process, the European Union re-opened another option – that of involving the EFI in servicing the Secretariat. The Swiss Federation proposed that the Secretariat be hosted in Geneva, creating competition for the candidature of Bonn, which had been put forward by Germany at INC-Forests3.

The largely political decision over these institutional questions is of some consequence for the future of the LBA, with regard to both the adoption process, and the prospects for opening the LBA to States outside Europe.²³ The implications of the choice were identified in a paper circulated by Switzerland at INC-Forests3, and re-circulated in Warsaw, as well as in the numerous documents analysed at earlier INC-Forests sessions.²⁴ The emergence of institutional jealousies is unsurprising, as this type of wrangling has historically characterised the evolution (and lack thereof) of the international regime on forests.

Given that a decision on institutional matters was integral to most of the remaining outstanding questions in this negotiation, Chair Heino personally conducted informal consultation on the issue for much of the week. Unfortunately, little progress was made, and the text of the negotiating draft remains largely non-finalised.

Delegates could also not agree on how to finalise other portions of the draft negotiating text, from the title of the agreement to its rules on voting and the Compliance Committee. The name debate ultimately revolves around the still open option of allowing accession by non-European countries. The title will presumably either indicate that the instrument is international, or emphasise its more regional/European focus.

A thornier question related to voting and the treatment of regional economic integration organisations.²⁵ The delegates of Iceland, Norway, the Russian Federation, Switzerland, Turkey and Ukraine expressed support for limiting the exercise of the right to vote by regional economic integration organisations to those of their member States present in each session of the CoP.²⁶ This suggestion was opposed by the EU, which argued that it was contrary to established practice under numerous international environmental agreements, including the UNFCCC, the Kyoto Protocol, the CBD and the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).²⁷ Switzerland objected that the recently negotiated Minamata Convention²⁸ may be interpreted as a move away from this practice, but the EU disagreed with this interpretation. The struggle over the right to vote is ultimately a political one between the EU and the non-European States, which are understandably reluctant to grant the EU an automatic voting majority at CoP sessions. No compromise on the issue could be reached in Warsaw and it is going to be interesting to see how delegates will address this important question at the resumed session of INC-Forests4.

Other outstanding matters include the establishment of the Compliance Committee; and the admission of observers to the CoP.²⁹ As it stands, the LBA text requires parties to monitor and report to the CoP on their progress in implementing SFM and on measures taken to implement the LBA.³⁰ In Warsaw, delegates abandoned the idea of an expert mechanism to review parties' reports, opting instead to entrust the Secretariat to "review, analyse, compile and report" information submitted by parties on the status and development of forests and progress in the implementation of SFM, drawing upon "the necessary

technical expertise".³¹ Delegates also agreed that a "facilitative, non-confrontational, transparent, cooperative and recommendatory" Compliance Committee should be established.³² This text remains bracketed, however, with regard to the information that the Compliance Committee may consider in carrying out its functions.³³ Some delegates suggested that the Committee should be authorised to consider "any information it deems credible and relevant", while others preferred a more restrictive approach.³⁴ The election of the members of the Compliance Committee and adoption of its terms of reference and rules of procedure by consensus were also subject to some debate and that text, too, remains bracketed.³⁵

Questions concerning the role of observers and public participation have emerged both in connection with the work of the Compliance Committee and attendance at CoP sessions. In Warsaw, the Russian Federation rejected suggestions that Committee members might be drawn also from stakeholder organisations and that such organisations might make submissions to the Compliance Committee. Thus, the text concerning the admission of observers at CoP sessions remains bracketed.³⁶ As it stands, therefore, the LBA's stance on public participation issues is rather far from progressive.

Conclusion

In Warsaw, delegates managed to make substantive progress on numerous matters, although consensus often entailed a significant lowering of the level of ambition reflected in the draft LBA. The negotiating text that emerged prior to the recess of INC-Forests4 is thus the result of a careful compromise, whereby delegates agreed on largely uncontroversial principles and objectives, without significantly raising the bar already reflected in the array of existing international and regional instruments dealing with forests. Arguably, it is the law-making process itself that is most interesting, given that it provides for the first time a platform to formalise a vast body of informal and soft-law forest instruments into a unitary, legally binding instrument. Viewed in this way, the fact that the process stumbled over issues that are largely procedural in nature, and do not really have much to do with forests, is seen to be less significant. These issues remain outstanding, reminiscent of controversies that have historically affected international processes dealing with forests.

It remains to be seen whether the resumed session of INC-Forests4 will manage to reach compromise on the institutional questions that are hampering the process. The INC-Forests Bureau indicated that the resumed session will take place in Switzerland, 6–8 November 2013. With the extraordinary FOREST EUROPE Ministerial Conference to be held by the end of 2013, however, the clock is ticking fast for INC-Forests.

Notes

1 Oslo Ministerial Mandate for Negotiating a Legally Binding Agreement on Forests in Europe, 2011, at 23 and 29.

2 INC4 Draft Negotiating Text – 14 June 2013 – 10:30am, Preamble, para. 6, available at http://www.forestnegotiations.org/INC/INC4/insession_documents.

3 *Ibid.*, Preamble, paras 9–10.

4 *Ibid.*, Preamble, para. 11.

5 *Ibid.*, Preamble, para. 8.

- 6 *Ibid.*, Article 1(a).
7 *Ibid.*, Article 1(j).
8 *Ibid.*, Article 3(a).
9 *Ibid.*, Article 3(f).
10 *Ibid.*, Article 2(a–d).
11 *Ibid.*, Article 2(e).
12 *Ibid.*, Article 19.
13 *Ibid.*, Article 4(1).
14 *Ibid.*, Article 4(2)(b). Vienna Resolution 1, Strengthen Synergies for Sustainable Forest Management in Europe Through Cross-Sectoral Co-operation and National Forest Programmes, adopted by the Fourth Ministerial Conference on the Protection of Forests in Europe, held in Vienna, Austria, 28–30 April 2003.
15 *Supra*, note 2, Article 4(2)(d).
16 *Ibid.*, Articles 5–10.
17 “Summary of the Fourth Session of the Intergovernmental Negotiating Committee for a Legally-Binding Agreement on Forests in Europe (INC-Forests 4)”, at 4. *INC-Forests Bulletin* Volume 180, Number 6, Monday, 17 June 2013 (IISD Reporting Services).
18 Available at http://www.forestnegotiations.org/INC/INC4/insession_documents.
19 *Supra*, note 1, at 27.
20 Cf. Savaresi, A. (2013). “Framework Negotiations Continue”. *Environmental Policy and Law* 43(2): 102–4.

- 21 *Supra*, note 17, at 8.
22 *Ibid.*, at 7.
23 *Supra*, note 20.
24 Cook, K. and Sands, P. (2012). “Analytical Document on some of the Key Aspects Involved in Deciding to Bring the Legally Binding Agreement on Forests in Europe under the United Nations Umbrella”, (Annex 5, Document 5/INC3), at http://foris.fao.org/static/forestnegotiations/Annex5_DOC5_INC3_EN.pdf; and Martin, M. and Prins, K. “Issues Arising from Paragraph 19 of the Report of the Second Session of the INC”, (Annex 6, Document 5/INC3), at http://foris.fao.org/static/forestnegotiations/ANNEX_6_DOC5_INC3_EN.pdf.
25 *Supra*, note 2, Article 13.
26 *Supra*, note 17, at 7.
27 *Ibid.*
28 See <http://www.unep.org/hazardoussubstances/MinamataConvention/tabid/106191/Default.aspx>.
29 *Supra*, note 2, Article 12(6).
30 *Ibid.*, Article 11.
31 *Ibid.*, Article 15(2).
32 *Ibid.*, Article 15(5).
33 *Ibid.*, Article 15(5)(j).
34 *Supra*, note 17, at 8.
35 *Supra*, note 2, Article 15(6).
36 *Ibid.*, Article 12(6).

